In the Supreme Court of the United States.

OCTOBER TERM, 1896.

ELOISA BERGERE, FOR HERSELF AND the other heirs of Manuel Antonio Otero, and Miguel Antonio Otero, appellants, v. THE UNITED STATES ET AL.	No. 279.
THE UNITED STATES, APPELLANT, v. ELOISA BERGERE, FOR HERSELF AND the other heirs of Manuel Antonio Otero, and Miguel Antonio Otero.	No. 299.

STATEMENT, ABSTRACT, AND BRIEF ON BEHALF OF THE UNITED STATES.

The petitioners, claiming as the legal representatives of one Bartolomé Baca, filed in the Court of Private Land Claims, on January 9, 1893, their petition for the confirmation of what is commonly known as the Bartolomé Baca grant, the area of which is not stated, but which has been estimated to contain all the way from a half a million to a million and a half acres.

In the petition it was alleged that on February 4, 1819, Bartolomé Baca petitioned the governor of New Mexico for a grant of land commonly called the "Torreon tract." In his application and as a consideration therefor he promised not to abandon it, and, if possible, to open lands for cultivation, whether they be irrigable or temporal; also to improve the irrigation of the same by the construction of reservoirs.

On July 2, 1819, the acting governor, Melgares, made an indorsement on the petition in the following terms:

> As he prays for according to law, with the understanding that no injury results to a third party but rather stock raising and cultivation will be enhanced under the conditions asked, Mr. José García de la Mora will proceed to give the possession, designating limits and officiating duly, which being concluded, he will transmit the *expediente* to this superior office, so that if it be approved the corresponding *testimonio* may be ordered to be given to the petitioner. Melgares.

On September 12, 1819, it is alleged that José de la Mora, as directed by the governor, placed Bartolomé Baca in the possession of the land for which he had petitioned and which had been conceded to him by the foregoing order, defined the boundaries thereof, and in which act of possession Mora obligated Baca to perform the conditions imposed, and recited in conclusion—

> Therefore I transmit this to the superior authority so that, being seen by you, it may determine as it shall seem just.

And it is also alleged that afterwards and during said year 1819 the aforementioned proceedings were by said

Justice Mora transmitted to the said Melgares, governor of said province, and by him approved, and upon such approval the corresponding *testimonio* of the grant was then and there delivered to said Baca, and he entered into the full and lawful possession of the tract of land so granted to him.

It is further alleged in the petition that in 1829, 1834, 1841, and 1845 the authorities of New Mexico, *with the consent of said Baca, made grants to other parties of portions of said land theretofore granted to him in 1819* (which allegation the evidence shows to be untrue as to the fact of these grants being made with the permission of Baca, no such permission appearing in any way).

It was further alleged that said Baca and those claiming under him had been in the continuous possession of said property since the making of said grant (which the testimony shows to be untrue).

The claims under several of these grants amounted to considerable land, and particularly the grant to Antonio Sandoval, made on December 7, 1845, it covering more than a hundred thousand acres of the grant to Baca, and it was not shown that either Baca or those claiming under him consented thereto, but, on the contrary, it was shown by the reports of the *ayuntamiento* of Tomé, the official body to which the applications were referred, that in all grants covering portions of this property it reported that the same was vacant, unoccupied, and unclaimed, and the granting of portions of the same did not conflict with the rights of any third party.

The owners of the Sandoval grant, made in 1845, were made codefendants with the Government, and filed an

answer specifically denying the allegations of the petition and alleging ignorance of many of its allegations, alleging possession in Sandoval and themselves since 1845, and also denying Melgares's authority to make the Baca grant.

On June 23, 1893, an answer was filed on behalf of the United States, in which the allegations of the petition were traversed, specifically denying the power or authority of anyone under the orders of Acting Governor Melgares to deliver to Baca juridical possession of the property, and that if Baca had possession of the same under said alleged grant he had abandoned it, and that the same remained vacant and unoccupied for many years prior to the acquisition of the territory by the United States, and that when the United States acquired sovereignty over it it was vacant, uninhabited, uncultivated, and abandoned, and passed to the United States as public domain. Also, that at the time of acquiring the political dominion over as well as title to property in this territory by virtue of the treaty of Guadalupe Hidalgo, the United States was not advised by the records or archives that anyone had any right in or claim to said property by virtue of any grant made by Melgares to Bartolomé Baca in 1819.

It was further averred on behalf of the United States that if Melgares attempted to grant said land to Baca the same was without warrant or authority of law and void, and alleged ignorance as to whether or not at said time, 1819, Melgares was the governor of said province and clothed with the authority to dispose of the public domain of Mexico.

It denied that the conditions imposed by law, as well as the terms of the grant, were complied with, and there-

fore the court was without jurisdiction to confirm said grant in the absence of such proof.

It also alleged that there was being asserted in the Court of Private Land Claims, in the name of J. Francisco Chaves, a claim for what is known as the Nerio Antonio Montoya, or Ojo de en Medio, grant, which was wholly included within the boundaries of the Baca grant sued for, which said Montoya grant was made by the officials on November 12, 1831.

Concluding the answer on behalf of the Government, it was alleged that the claim was not such a one which, under the law of nations, treaty of session, or the act of Congress of 1891, the court should respect or recognize.

From the original title papers, which were never deposited in the archives, but were produced from private hands, it appears that on February 4, 1819, at San Fernando, Bartolomé Baca directed a petition to the acting governor, stating that he was captain of the volunteer militia company of cavalry of the villa of Albuquerque, and resided in the jurisdiction of Tomé; that he had a number of sheep, horned cattle, and horses, without legitimate property on which to keep them together under shepherds, cattle herders, and horse herders to take care of them and secure their safety; that there was vacant on the other side of the Abó Mountain a tract called the *Torreon*, which extended on the north to the Monte del Cibolo, on the south to the Ojo del Cuervo, on the east to the springs called the Estancia Springs, and on the west to the said Abó Mountain; and he asked a grant of the same in royal possession in the exercise of the powers conferred by His Majesty, in order that he

might establish thereon a permanent ranch or *hacienda*, which he engaged to occupy with his stock, sustaining the same with armed servants, who would defend it against the incursions of the enemy, and that he would not abandon it; that he would also, if possible, open lands for occupation, whether irrigable or dependent upon the seasons, for the advancement of agriculture, and although the water sources it contained were small and uncertain he promised to improve them with reservoirs and other appliances which would secure every advantage possible. He affirmed that at that time there was no owner for the land and that there had never been any owner for the same, and requested that he be placed in possession with the proper documents and formalities. (R., 8–9.)

On July 2, 1819, at Santa Fé, Melgares, the acting governor, indorsed thereon the following:

> As he asks it according to law, and I understanding that no injury results to any third party, but, on the contrary, increase of stock raising and agriculture under the conditions asked.
>
> Don José García de la Mora will proceed to give the possession, designating limits and doing what is proper, which being concluded he will transmit the *expediente* to this superior office, so that if it be approved the proper *testimonio* may be ordered to be given to the petitioner.

In execution of this order, José García de la Mora reported that he proceeded in company with Bartolomé Baca, about whom he voluntarily stated as follows:

> Who, by his merits and conduct in the service of both majesties, as has been proved by the offices

which have been conferred upon him of alcalde mayor, and in other services in the field, the governors always appointing him commander of campaigns and scouting parties, which he always led with honor and valor, and in addition to all this he has always surpassed others in voluntary contributions, setting a good example to his inferiors. Wherefore, in reward of all these merits and services, etc.

He then states that he proceeded in his company to examine the tract applied for, and knowing it to be wild land, and no injury resulting to any third party, he placed him in possession, in the name of the King, "and I took him by the hand and led him over the whole tract, he shouting and plucking up grass and throwing stones in the name of the King, saying, 'Long live our beloved monarch, Don Fernando VII, whom may God preserve,' with hurrahs and shouts, and I shed tears of delight at his acclamations," etc.

The foregoing part of this grant seems to be wonderfully personal to Mora and Baca. It does not appear, however, from anything that has ever occurred that this grant was made or intended to be made to Baca on account of his services and contributions to the King, and nowhere can anything be found to that effect except the voluntary statement of the alcalde. I may challenge the correctness of his statement wherein he says that he led Bartolomé Baca over the whole tract, and also that upon Baca taking possession he (Mora) shed tears of delight at Baca's acclamations. It may be very formal, but I doubt very much the truthfulness of Mora's recitals, as well as the power or duty of the alcalde to make the same.

Continuing, he says:

> I designated to him for his boundaries: On the south, the Ojo del Cuervo, following its line to the Ojo del Chico; on the east, the Cerro del Pedernal; on the north, the Ojo del Cibolo; on the west, the Altura de la Sierra (summit of the mountain range), the said gentleman being satisfied and grateful to the said governor for the benefit conferred upon him, binding himself to increase by his intelligence the limited waters which have been donated to him in order that his herds may be maintained, to which he is bound, transmitting the whole for your approval. He will satisfy the fees which may be charged to him.
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> Wherefore I transmit this to you, the superior authority, in order that, it being examined by you, you may decide as you deem just. (R., 9.)

The document is signed at San Fernando, September 12, 1819.

It will be noted that it was not intended that grant documents should be issued by the alcalde, but that the petition or order of July 2, 1819, and the alcalde's report of the delivery of possession should be returned to the governor, in order that he might take such further action as he deemed necessary, and that in case of his legalization of the proceedings a copy of the same might be given to Baca to serve as evidence of title.

There appears upon this paper some kind of an indorsement by Melgares, the Spanish of which, as it exists today, is "——— de los límites por ———" "elgares," which is translated by Mr. Key as "——— the boundaries by ———" "elgares." This is the only portion of this document which seems to be mutilated or torn so

that it can not be fully made out. It is admitted by the Government that the document produced was executed according to its purport, and that the signatures thereto are genuine, and that it is original in all its parts; but I assert it should never have been in the possession of Bartolomé Bacan or any of his heirs, but should have been in the archives, and their evidence of title should have been a *testimonio*, or copy.

It was shown by the evidence that these documents were found by a grandson of the original grantee among the papers left by his father, and that his father was the son-in-law of Bartolomé Baca, the original grantee, and was the administrator of the estate of said Baca. The witness thus testifying, Bartolomé Chavez y Baca, also testified that he was born in 1834, after the death of his grandfather, Bartolomé Baca; that Baca lived in San Fernando (not on the grant). He had two sons, Manuel Baca, who died prior to his father, and Juan Baca. Witness stated that his mother was a daughter of Bartolomé Baca. He was the administrator of his father's estate, and after finding part of the present grant document he took it to Manuel Antonio Otero, and, after looking at it, Otero said, "Let us search for the other part and I will buy it from you and the other heirs," and that they did make the search, found the other part, but there was one little piece missing which they never found (R., 22). He identified the paper and the signature of his grandfather. He testified that Baca had seven children, and that the children after their father's death lived at Torreon, within the limits of the

grant, and some of them lived at San Fernando and other places. Witness' father lived on the grant from 1857 to 1863 at Torreon, and was a farmer. He testified generally to the use of the property from time to time by the herders for pastoral purposes, but was unable to give any definite account of the various settlements on the grant or the fact that subsequent to 1834 there were people living on the grant under the distinct and separate grants claimed to be from the Mexican Government, professes entire ignorance of the same, and does not understand what the ayuntamiento of Tomé means (R., 21–36).

This witness was recalled for further examination, for the purpose of comparing his testimony given before the Court of Private Land Claims with that given before the surveyor-general under the law of July 22, 1854, which is copied hereafter in full. An examination and comparison of the testimony given on these two different occasions shows the unreliability of his recent testimony in this case by reason of his interest:

> Q. Did you testify in this case before the surveyor-general?
>
> A. Yes, sir.
>
> Q. Were you examined at length before the surveyor-general?
>
> A. Yes, sir.
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> Q. Was not this question propounded to you: "Q. Are you personally acquainted with the children and heirs at law of Bartolomé Baca, deceased; and if so, how long have you known them, and where have they lived since your acquaintance with them?" and did you not make this answer: "A. I did not know all his children, but I know all the

neirs and have known them as long as I can remember, they being my kinsfolk. They have all resided always here in the Territory"?

A. Yes, sir.

Q. Was not this question asked you, and did you not make the following answer: "Q. Do you know whether Bartolomé Baca, your grandfather, left any last will and testament in writing? If so, do you know where that will is?—A. I do not know?"

A. Yes, sir.

Q. Was not this question asked you, and did you not make the following answer: "Q. Is it not true, upon reflection, that your grandfather left a last will and testament in writing, and did not that will come to your actual possession, and if to your actual possession, did you not deliver it to Manuel A. Otero or some other person;" and did you not make the following answer: "A. He may have made such a will, but I know of none and delivered none to said Otero or to anyone, but did deliver to said Otero the grant for said land?"

A. Yes, sir.

Q. Was not this question asked you, and did you not make the following answer: "Q. How many towns and settlements are there within the boundaries of the grant in question, and how long have they been in existence;" and did you not make the following answer: "A. There are the towns of Torreon, Tajique, and Chilili, and I know of no settlements, although there are said to be some small ones in the mountain. I do not know how long the towns have been in existence, but they were there when I first knew the localities and were settled after the death of Bartolomé Baca; unless it be Torreon, as to which town I can not say?"

A. Yes, sir. I did not say that they were settled after the death of Bartolomé Baca. (R., 53, 54.)

José Antonio Padilla y Montoya testified on behalf of the plaintiffs that he was born in 1808 and had lived at Manzano for forty years, and prior to that time at Valencia. Has known of this grant to Bartolomé Baca since 1829. When he first went to Torreon, about 1829–30, Juan Baca and Manuel Baca were there with *peons* (servants). They had a corral at Torreon, and houses. He also testified that all of them who lived at Manzano were his servants. They herded their horses at the Estancia. He saw an irrigating ditch which was running along at the beginning to the Vega Blanca, at Torreon, and there was also an *acequia* on the other side, and these were for the gardens. They had driven him away from the acequia because it belonged to them exclusively. All of the servants of Baca at Torreon planted some land with corn, beans, and a garden, but he did not know how much. Knew Bartolomé Baca in his lifetime very well. He says that at the time Baca died there were no other persons except his servants and employees living at Torreon; that the town consisted of four or five houses of the workmen. He saw a great many horses, cattle, and sheep upon the grant; heard the sons of Baca say that the property belonged to their father. This witness stated that there was a spring at Torreon, and testified as follows:

Q. That is how it got its name, wasn't it?

A. Torreon was built there by Don Bartolomé Baca.

Q. Then it did not have the name of Torreon before Bartolomé Baca went there?

A. No, sir.

Q. He gave it that name?

A. The people gave it that name because Bartolomé Baca built a torreon there.

Q. You remember it?

A. Yes, sir; I remember that it was because Don Bartolomé Baca built the torreon there, and it was called the torreon of Don Bartolomé Baca.

He also testified that he knew a man by the name of Nerio Antonio Montoya, who lived at Ojo del Monteno and had a ranch at Ojo del Chico. He knew a place called Tajique, also Chilili, and knew a place called Tomé, which lies to the northwest of Manzano about 10 leagues. He knew a man, also, by the name of Antonio Sandoval. He also knew Juan Baca, son of Bartolomé Baca, and saw him at his father's house in San Fernando. On cross-examination, the witness stated that he did not know what relations existed between Nerio Antonio Montoya and Bartolomé Baca, except that they were neighbors. It was after Baca's death that Montoya came to the hog ranch at Chico. Bartolomé Baca had hogs at that place for some years. He knew a man by the name of Marian Torres, who lived at Manzano, very well, and he had also lived at Torreon. He worked for Bartolomé Baca as a sheep herder and also did other work. Knew Clemento Chavez, who lived at Enlames, and he lived at Tomé after he was married. Does not know whether he ever worked for Bartolomé Baca or not. (R., 38–45.)

The plaintiff read the deposition of the following-named witnesses, their testimony being taken before the the surveyor-general in 1878–79 in relation to this claim

and filed with that officer under the provisions of the law of July 22, 1854, it being shown that said witnesses were deceased at the time of the trial of this cause in the Court of Private Land Claims. The difference in the testimony of the witnesses as given in 1878 and 1879 and on the trial in the Court of Private Land Claims is very marked and noticeable.

Jesus Saavedra, presented to the surveyor-general on September 13, 1878, by the claimants for the grant and examined by their attorney, stated that his age was 75 years, was acquainted with the tract known and called the Estancia grant in Valencia County, Territory of New Mexico; that the boundaries were, on the north the Cibolo Spring, on the east the Cerro del Pedernal, on the south the Cuervo Spring, and on the west the summit of the mountain. He lived on the grant as the servant of Bartolomé Baca from 1819 until he died; Baca had a log house on the land and some corrals, 40,000 head of sheep, 300 mares, and 900 head of cattle. The house was occupied by the sons of Bartolomé Baca, José Manuel Baca, and Juan Baca. He was present when Bartolomé Baca was placed in possession of the property in the year 1819, when he went to live upon the grant; Baca died at the little town of San Fernando, near the town of Tomé. Witness further testified that there were only two towns on the grant, Tajique and Torreon, the former having some eighty and the latter some fifty families. Bartolomé Baca never resided himself upon the land, but made regular visits to his *hacienda* to see his sons and to look after his property. When the sons were on the grant they lived at Estancia

Spring. Witness never knew of any other grant covering any portion of the Baca grant prior thereto and knows of no one since; does not know of a grant to the town of Tajique or to the town of Torreon; never heard anybody claim any portion of the land adverse to Bartolomé Baca. (R., 65–68.)

Miguel Lucero testified before the surveyor-general on the same day that he was 80 years old; resided in the town of Manzano; knew of the tract called the Estancia tract, and it was bounded on the north by the Cibolo Spring, on the east by the Pedernal Hill, on the south by the Laguna del Cerro, and on the west by the Crow Spring, and he has known the tract described since 1816. He had always lived at Manzano, but had often been on the land in the employment of Baca looking after stock. He was present at the time the act of possession was delivered by Mora to Baca, and knows the boundaries of the grant because they have been shown to him by Bartolomé Baca. He was on the grant a short time after Baca's death, gathering up the cattle for the wife of Baca. Baca died in 1835, having been placed in possession of the property in the year 1822, he thinks in the month of April; he knows the identical tract of which Baca was given possession, as he was present at the time.

> Q. Did the alcalde at the time go to the different boundary objects, and what did he do at the time of executing the possession?
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> A. The alcalde with his finger pointed out the respective boundaries, and afterwards took the cordel—a rope—and measured to them.

Baca never lived upon the land, but lived at San Fernando with his family, and he never knew of his claiming any other tract of land except his holding at San Fernando, although he was a rich man and had considerable land, which had been acquired by purchase. There are two towns or settlements upon the grant, Torreon and Tajique, but he does not know under what title the inhabitants of these towns claim. The two towns have about forty families each, and they are about all the inhabitants in the neighborhood. (R., 68–70.)

Mariano Torres, another witness who testified before the surveyor-general, stated that his age was 70 years, his residence Las Tablas, Lincoln County; has known the Estancia grant all of his life; its boundaries are, on the north the Cibolo Spring, on the east Pedernal Hill, on the south the Crow Spring, and on the west the summit of the mountain; the land has always been known as the property of Bartolomé Baca, now deceased, and it was occupied by him until his death, which occurred many years ago. When the witness first heard of the grant he lived in San Fernando in the neighborhood of Bartolomé Baca, and he continued to reside there until 1846. He became acquainted with the boundaries of the grant in 1821 as a stock herder for Baca, and Baca's son stated the boundaries of the grant to him. He stated that all the people of Torreon and vicinity understood what the boundaries of the grant were, as also the people along the Rio Grande and Rio Abajo. Bartolomé Baca never lived on the grant, residing at San Fernando; at that time there was no town at Torreon, only a ranch, which was Baca's property. The town of Torreon now has a

a population of more than twenty-five families, as Baca permitted several families to go and occupy the place, and in this way there is now a town there, he inviting families to go and live there on account of the protection they would afford his interest. Baca erected a torreon or blockhouse, *from which comes the name Torreon for the town now there;* there was no other settlement or rancho upon the tract.

(NOTE.—This witness is evidently mistaken, as the tract was called the Torreon tract in the petition when it was made, and consequently the place could not have taken its name as the witness indicates.)

There are also upon the tract the towns of Tajique and Chilili. The town of Torreon is about a mile north of the Crow Spring. Tajique was settled probably in 1842 or 1844 by poor Mexicans, small farmers and laborers. Bartolomé Baca owned lands at San Fernando, Peralta, Joya de Cervilleta, and at Enlames, all of which were held by purchase, except a piece of land granted to him at San Fernando. (R., 70–72.)

Jesus Saavedra y Romero was examined before the surveyor-general on January 8, 1879, and stated that he was 84 years old; was present at the *ayuntamiento* of Tomé at the time action was taken on the petition of the Manzano people for their grant of land. (Copy of this grant is found in the record, p. 91.) It was in the year 1829, after the boundaries of the Manzano grant were established, that Don Bartolomé Baca, sympathizing with the people of Manzano, ceded to them all the land within their boundaries, with the exception of his cultivable land.

(This can not be true, because the town of Manzano, according to the testimony of all the other witnesses, was entirely outside of the grant, and no reference is made in the title papers to the release by Bartolomé Baca of any claim to the grant.) Witness understands the north boundary of the Manzano grant to be the Torreon Creek. He has no knowledge of Baca ever surrendering any other land to any other people. (R., 72.)

On December 3, 1879, Clemente Chaves testified before the surveyor-general that he was 69 years of age and lived at Tomé, Valencia County; was acquainted with the grant known as the Bartolomé Baca or Torreon grant, and first knew it in 1822; knew Bartolomé Baca from 1816 to 1833, when he died. Baca occupied the land in question with his herds of sheep, cattle, and horses, and had corrals there. Baca was in occupation in 1822, and witness was there, but he does not know whether Baca lived on the land or not. Baca lived in San Fernando, but witness saw him on the land with his peons. The uncle of witness was Baca's chief herder, and lived at Manzano. Witness heard that Baca went on the tract in 1821, but he has no positive recollection of seeing Baca on the land after 1822. The Navajoes compelled Baca and others to leave that part of the country and bring their herds down to the vicinity of Abó Pass. The Navajoes were killing men and stealing stock in the neighborhood. Up to the time of his death Baca was the recognized owner of the grant, and up to 1833 Baca had herds on the grant. Between 1822 and 1833 the Indians were part of the time peaceable and part of the time at war. Baca had sons and daughters who survived him, but he never knew

of any of the children occupying the land. Witness was a senator in the Territorial legislature in 1864 and 1865, and was sheriff of Valencia County in 1850, and was also justice of the peace. He does not remember when Bartolomé Baca abandoned the grant. In 1829 Felipe Montoya, Francisco Moya, Antonio Chaves, Juan Cristoval Sanchez, and others took possession of El Torreon, leaving the ranch of Bartolomé Baca, where he had his sheep and corrals, to him; that Baca occupied, as he understood, about 300 varas in width from east to west and from north to south, but he does not know how far it was to the boundaries of the grant, but so far as he knew Baca claimed no more than three hundred varas, and this was under cultivation for a distance of about one hundred varas from north to south, and he thinks this was in 1829 or 1830, but Baca may have had this land under cultivation prior thereto; that the persons he mentioned above came in by consent of Baca, who reserved the tract above referred to to himself for cultivation, and also the balance of the tract; that when Felipe Montoya and Francisco Moya and the others took possession of their land they left Bartolomé Baca 300 varas for his own use and to cultivate or rent out to the others, and in addition to these persons José Maria Baca and Eulogio Sais came in and took possession of the remainder of the grant, but Felipe Montoya and Francisco Moya were the principal claimants of the lands, and they made application, he thinks, for the land to Antonio Sandoval, who was justice of the first instance. (R., 73–75.)

This witness also testified that he was born in 1810 and has lived at Tajique since 1833, except three years;

has known Bartolomé Baca from his earliest recollection, and he died in 1834; has known the grant since 1819; lived at the town of Tajique and the immediate vicinity three years, the town being a league from the grant boundary. Baca lived at San Fernando, but he has seen him on the grant looking after his stock; but does not know of others than Baca and his heirs living on the grant and about the town erected on the tract. The town is called Torreon, and, as the witness is informed, was settled by persons upon invitation and with permission of Baca, and he knows of no other town on the grant. Subsequent to 1819 the property was respected as that of Baca, and subsequent to the death of Baca the property was recognized and respected as that of his heirs. Baca had ranches at Torreon and at Estancia—that is, at Torrean Spring and at Estancia Spring—and these were the only places where he saw ranchos. Witness stated that other parties besides the heirs of Baca understood that Baca owned the grant, to wit, Matias Sanches, in the years 1839, 1840, and 1841, at Tajique; José Sanches, at the same time and place, and also José Lorenzo Otero and Antonio Otero; Bernardo Chavez, now deceased, in 1837, and sundry other people. (R., 77–80.)

A. M. Bergere, husband of the plaintiff, testified as to the boundaries of the grant as he understood them and as to the search made for mesne conveyances. (R., 47–49.)

Miguel A. Otero, another of the claimants, testified as to the attempt to find the original mesne conveyances from the heirs of Baca to the Oteros. (R., 49–51.)

Clarence Key, a translator, testified as to examination of the archives in the surveyor-general's office of New Mexico, with reference to the custom of delivering original grant papers in lieu of *testimonios*, and as to the record usually made thereof, but his testimony throws very little light on the subject. (R., 51–53.)

This closed the case in chief for the plaintiff.

On behalf of the Government, a paper, purporting to be a certified copy of the last will and testament of Bartolomé Baca, the original grantee, was offered in evidence, for the purpose of showing that at the time of his death in enumerating his property he does not mention the fact that he owned this enormous tract of land or that he had any interest in the same. The paper was not offered as a certified copy of the will, but as a copy of a written declaration made in 1834. (R., 84–85.)

In relation to this document, Mr. Tipton, a very reliable expert and a gentleman more familiar with the archives and title papers in New Mexico than any other living man, with it before him, testified that each leaf of the document bore the indorsement of the legalization of the use of the paper in the handwriting of Francisco Sarracino, a prefect of that district. As to the signature of José Salazar, the witness was not able to testify. As to the signature of José Maria y Baca, one of the witnesses, he thinks he has seen it in the archives, but does not express an opinion. The signature of J. de Madariaga he has seen before and he believes it to be genuine. The signature of Miguel Aragon he believes to be genuine and gives his reasons therefor. The signature of

Jacinto Aragon he believes to be genuine. As to the whole document, he has seen the same handwriting frequently in the archives. His testimony in relation to the various signatures will be found in the record (pp. 62–64).

The Government offered in evidence the title papers in the following grants:

MANZANO GRANT, 1829.

On September 22, 1829, on behalf of himself and in the name of the settlers of Manzano whose names appear in the margin, José Manuel Trujillo presented a petition to the corporation of Tomé, stating that not having deed of possession to the town which they had settled, and the site of said town not being known to be owned by anyone, they requested the *ayuntamiento* to grant possession thereof, giving the boundaries from north to south, from Torreon to the old mission of Abó, etc. (R., 91.)

On September 25, 1829, the corporation of Tomé referred the petition to the territorial deputation, with the remark that the corporation knew of no obstacle against making the grant to the petitioners, the only objection being found in regard to the arable land therein situated belonging to retired Lieut. Col. Bartolomé Baca, who will be satisfied with the land which, as a new settler, he may acquire, together with that which he has purchased from other settlers, promising that although he will not establish his residence there, he will cultivate and improve the lands which may be recognized as his. (R., 91.)

On the 28th of November of the same year the territorial deputation decreed upon the report of the *ayuntamiento* of Tomé that the justice of the jurisdiction should place the petitioners in possession of the land asked for, giving to each one the tillable land he may be able to cultivate, leaving the remainder to such other individuals who in the future might establish themselves thereon, limiting the boundaries to one league in each direction, and in compliance with this decree the alcalde, Jacinto Sanchez, proceeded to deliver possession of the same and make allotments. (R., 92.)

No mention is made in any of these proceedings that Bartolomé Baca ever owned or claimed to own any large tract or grant which might by any possibility conflict in any way with the same.

NERIO ANTONIO MONTOYA GRANT, 1831.

This grant lies entirely within the outboundaries of the Bartolomé Baca grant, and was at the time the grant was heard before the surveyor-general, and is still, claimed by one of the witnesses for the Government, J. Francisco Chavez, to whose testimony we will call attention.

The petition for this grant was directed to the corporation of Tomé on February 28, 1831, and makes no mention of Bartolomé Baca or his interest in the property. (R., 85–86.)

The report of the *ayuntamiento* shows that no injury would result to anyone, but it would be of great advantage in the interest and encouragement of agriculture, and recommended to the excellent territorial deputation that the grant be made. (R., 86.)

On November 12, 1831, the territorial deputation authorized the constitutional alcalde to execute the documents to the grantee which would secure the grant. (R., 86.)

Then follows the act of the alcalde, wherein he recites that when he delivered possession to Montoya he proceeded to the land and stood thereupon, and no injury whatever resulting he designated the boundaries, etc. (R., 86–87.)

Then follows a conveyance in 1848 by Nerio Montoya to Juan Perea and his sister, Dolores Perea.

Colonel Chavez, who owns this grant, testified before the surveyor-general and also, on behalf of the Government, at the trial of the cause in the Court of Private Land Claims, and the discrepancies between his testimony given in the Court of Private Land Claims and before the surveyor-general are very noticeable.

Testifying on the trial of this cause, he stated he was 61 years of age, was born in New Mexico, and had lived there all of his life with the exception of the time he was away at school. Knows the general location of the Bartolomé Baca grant, and has been familiar with it since 1858; since that time has been quite familiar with it. He built a house upon the grant at Ojo del Medio in 1858, nobody being in possession of the grant at that time. He first heard of the grant at that time, although he was not notified that a grant had been made, and he understood that it covered the Nerio Montoya grant. Except from their statements, he did not know that the heirs of Baca claimed to own the Baca grant or were in possession of

it at any time. Juan Chavez, the father of Bartolomé Chavez y Baca, showed him the boundaries of the grant from his house, but he did not go over them.

Q. Did any of the heirs and legal representatives of Bartolomé Baca claim to own any interest in the grant at the time this matter was pending before the surveyor-general?

A. Yes, sir; they did.

Q. Didn't you testify before the surveyor-general, in reply to such question, that "as to the dead persons I do not know that they ever laid any claim to the grant; the few who had lived upon it, both from their actions and statements, never laid any claim to the grant until within the last six or seven years?"

A. I did, sir.

Q. You have an arrangement by which you receive the title in case this grant is confirmed?

A. I have, sir.

Q. That is the reason you have not pushed that claim?

A. Yes, sir.

Witness said that at the time he testified before the surveyor-general he did not know what grants were claimed to conflict with the Bartolomé Baca grant. He had an idea that it conflicted with the Nerio Montoya grant and the Tajique and Torreon grants, these being all that were claimed at the time. He asked the surveyor-general's clerk, Mr. Miller, to let him see the papers of the grant, and he discovered that the Sandoval grant conflicted. In 1858 Manzano was the largest town in New Mexico. There must have been 3,600 people there at the time, and the whole country was very prosperous. A great drought followed, however, and the

country was depopulated. At the time there were about 800 people at Torreon, and all the towns were prosperous, and when rains were seasonable they raised fine crops. At the time he was before the surveyor-general he was there in the interest of the Manzano people, whom he represented, and the statements he made at the time he believed to be true.

On cross-examination by counsel for the plaintiff, the witness stated that he never knew of the grant papers until the time he went to Santa Fé to testify before the surveyor-general; did not know at the time he gave his testimony that the papers had been discovered, and his testimony was upon the theory that he believed they had no claim to the grant. One of the witnesses whose testimony was taken had told him about the Bartolomé Baca grant and that they used to keep people away from it. One of the grandchildren of Baca lived at Tajique, and he had hauled the stone to build his (Chavez's) house.

In answer to a question by the United States attorney as to whether or not at the time he testified he knew the papers of the Baca grant had been found, he stated that he had come to Santa Fé with certain purposes, and asked Mr. Miller, the chief interpreter of the surveyor-general's office, if there was any such grant; that he was in doubt about the title, and Miller let him have all the papers in the case, and he looked over them, and told the Manzano people so. This was the first time the witness had ever seen the Bartolomé Baca papers or examined them. He had heard the Bartolomé Baca people say they had a grant, but had lost the papers, and could not find them. (R., 58–62.)

TAJIQUE GRANT, 1834.

This grant appears to have been made to Manuel Sanchez on his petition of March 9, 1834, on behalf of himself and a number of individuals, and in their petition they stated that they had discovered a tract of land suitable for cultivation at the point Tajique, which was vacant, and consequently no injury would result to third parties. (R., 96.)

On March 17, 1834, Governor Sarracino directed the constitutional justice of Valencia, to which jurisdiction Tajique then belonged, to make the division asked for within the boundaries set forth, provided no injury resulted to any third party, and stated that the grant was temporarily made by him in order to avoid delay in planting, but that it was subject to the confirmation of the most excellent territorial deputation when it met. (R., 97.)

Vicento Otero, the constitutional justice of Valencia, stated in his report that he delivered possession of the same, and again as late as December he delivered possession of parts of the same lands to others. (R., 97–98.)

In all these proceedings not one word is mentioned as to the claim of Bartolomé Baca or his heirs, and this grant was made about the time of his death, it lying within the boundaries of the claim made by the claimants in this case.

CHILILI GRANT, 1841.

On March 8, 1841, for themselves and twenty others, Santiago Padilla and six others petitioned for the grant of a tract of land at the town of Chilili, which was abandoned and without any owner, and that they be placed in possession of the same. (R., 99.)

On March 20, 1841, Governor Armijo directed Antonio Sandoval to place the parties in possession of the land, giving them the boundaries and limits as set forth by them in their petition, informing them that as colonists they were to remain there without disposing of the land for the four years required by law. (R., 99.)

Then follows the report of the delivery of possession by Antonio Sandoval. (R., 99–100.)

This grant is within the outboundaries of the present claim, and no mention is made in any of these proceedings that Bartolomé Baca, his heirs, or anyone claiming under them, had or claimed to have any interest in this property.

ANTONIO SANDOVAL GRANT, 1845.

On December 5, 1845, Antonio Sandoval, a very prominent man in the Territory, petitioned the governor of the Territory for a large tract of land known as the Salt Lakes tract, stating that he makes the petition because the land is vacant and in a condition of mortmain, and that it will prejudice no third party. (R., 88–89.)

On December 7, 1845, Governor Armijo, in consideration of the services of Sandoval, which he recites, grants him the land according to the boundaries that he asks. (R., 89.)

Then follows the certificate of Ramirez, treasurer of the department, that Sandoval had rendered services and contributed money to the Government. (R., 89–90.)

Then follows the act of possession of December 15, 1845, the delivery being made to Juan Antonio Aragon,

the agent of Sandoval, of a large tract of land of between 400,000 and 500,000 acres, which conflicts very materially with the claim of Baca. (R., 90.)

The title papers in these various grants are offered for the purpose of showing that from 1829 to 1845 the various officials and official bodies of New Mexico had occasion to investigate and report whether or not the land embraced in the Baca claim as made to-day was then vacant or claimed by anyone, and invariably and in every instance it was reported that the land was vacant and unclaimed, and I take it that these various actions of the officials and official bodies constitute the strongest proof possible that neither Bartolomé Baca nor his heirs or anyone claiming under them ever made, during all that time, a claim to this immense tract of land. Considering such testimony in connection with the irresponsible and unreliable statements of sheepherders and *peons* leaves little doubt as to the weight of the testimony being in favor of the contentions of the Government.

BRIEF AND ARGUMENT.

It is apparent from the title papers that no rights were to pass to Bartolomé Baca by any action of the alcalde without the subsequent approval of Acting Governor Melgares; nor was the alcalde authorized to deliver to Baca any instrument evidencing his action in the premises. All of this was specifically reserved by the governor for his action before it possessed any validity. (R. 8, 9.)

The questions arise, Did Acting Governor Melgares approve the action of the alcalde; did he issue to Baca

the *testimonio* as evidence of title, and was the original deposited in the archives as perpetual evidence of Baca's rights and notice to all the world of the disposition of the land?

The evidence negatives each of these questions.

1. The claimants do not produce the *testimonio*, the primary evidence of title, nor do they assert that such an instrument was ever issued. Hence, that particular and all-important action should be resolved against the *bona fides* of the claim.

2. The evidence of title produced upon the trial, from private and improper hands, was the original expediente, with an indorsement thereon by Melgares so mutilated that it is now impossible to determine what it was. In every other respect the instrument is fairly preserved. This instrument without the approval by the governor had no validity, and constituted no evidence of title against the Crown, even had it been found in its proper place among the Spanish archives, unless the *testimonio* which was provided for (R., 9) was shown to have been issued and delivered and had been lost or destroyed.

It appears from the evidence of Bartolomé Chaves y Baca, grandson of Bartolomé Baca, the documents produced were accidentally found by him among the papers of his father in a box of papers that had belonged to Bartolomé Baca, and that they were taken to Manuel Antonio Otero. Another search was then made for some parts missing, upon Otero suggesting he would buy them. This search resulted in all being found *except one little piece* (R., 22). At that time witness sold his interest to

Otero (R., 29). These parts, together with the testimony of this witness as to possession and his knowledge as to the existence, claim for, and extent of the grant, clearly justifies the application of the maxim "*Omnia præsumuntur contra spoliatorem.*"

If this mutilated indorsement of Melgares is to be treated as a nullity, the expediente in all its parts must be treated as constituting no evidence of title against Spain, consequently none against the United States. Without such approval the action of the alcalde was void. (See decree, R., 9.)

Under all governments having public lands to distribute amongst its citizens, a record of the acts of officials and final grant are required to be kept in order that the Government may know the public lands, and the citizens have proper means of verifying and protecting their titles.

The proper Government record in this case was found more than half a century after the date of the alleged grant in an old box in the possession of the grantee to present claimants. During this period the country had changed sovereignty twice, without any notice appearing by the public records, or by actual possession and assertion of title of an open, notorious, and public character so as to place the Mexican Government or its officials upon their inquiry.

The best evidence that the claimants were not asserting such title and ownership as to put anyone upon inquiry is the report of investigations that were officially made by the various Mexican officials from 1829 to 1845.

Manza grant (1829), R., 91–92.

Nerio Antonio Montoya grant (1831), R., 85–87.

Tajique grant (1834), R., 96–98.

Chihili grant (1841), R., 99–100.

Antonio Sandoval grant (1845), R., 88–90.

All the papers relating to the foregoing grants are admitted to be genuine. (R., 55.) It is immaterial whether any of these grants were lawfully made or not. The recital of facts by officials and official bodies of whom official information was sought as to the occupancy of and claim for this immense tract of land furnish almost conclusive evidence that the land was vacant and unclaimed, and the granting of the lands petitioned for under the foregoing claims *would not injure any third party.*

Bartolomé Baca, from independence, in 1821, to the time of his death, in 1834 or 1835, was one of the most prominent men in New Mexico, part of the time the presiding officer of the Territorial deputation, and it is extremely probable his ownership of such a tract of land, so situated and so valuable, would likely have been a matter officially and publicly known, especially to the ayuntamiento of Tomé, having jurisdiction over the same, and to Antonio Sandoval, another prominent and wealthy Mexican.

The Government offered in evidence what purports to be a certified copy of the will of Bartolomé Baca. (R., 81–85.) This instrument was obtained from the wife of a grandson of Baca (R., 55–56), and its certification is reasonably well shown. (See testimony of Mr. Tipton, R., 62–64.)

The document was offered not as a will, but as a declaration by Baca during his lifetime, and just prior to his death, of the property he owned; this grant, it will be noticed, is not mentioned, although the instrument is on stamped paper for the years 1833 and 1834, and seems regular and carefully drawn.

This declaration, and the reports of officials from 1829 to 1845 as to the property being vacant, unoccupied, and unclaimed, and taking the scope and wording of the will, leaves but little doubt of its being a true copy and entitled to be considered, in connection with the other facts and circumstances, not as a will, but as an admission or declaration.

The foregoing considerations justify me in the conclusion that when Alcalde Mora returned the expediente to Melgares his indorsement was a disapproval, and the papers, being of no further value, were never deposited in the archives, and in some way came into the possession of Baca. This theory also accounts for the absence of any *testimonio* as evidence of title; it also accounts for the absence of active assertion of title during Baca's lifetime between 1829 and 1834 or 1835. I have no doubt Baca had stock on the grant prior to his death, as well as other people. Anyone acquainted with that country, even at the present time, can fully appreciate of how little value as evidence of possession and title is pasturing and grazing sheep, cattle, and horses over the vast areas of unfenced lands in New Mexico and Arizona; imaginary lines are and always have been ignored; boundaries

of land grants have never been respected in the use of lands for such purposes.

Under the Mexican Government a grant was not proved by pasturing or cutting timber. (*De Arguello* v. *U. S.*, 18 How., 539; *U. S.* v. *Tischmaker*, 22 How., 392; *U. S.* v. *Vallejo*, 22 How., 416.)

The effect of grants by the Crown in respect of wood, waters, and pastures is fully and carefully disclosed in Book IV, title 17, law 5, Laws of the Indies (vol. 2, p. 57). (*See 2 White, p. 56, sec. 93.*)

The policy of Spain and Mexico, on account of the aridity of the country, was to give general use, without proprietary rights, to those first appropriating pastures and watering places. On November 25, 1818, Nicholas Garrido, as attorney-general for East Florida, had occasion to pass upon the attempt to hold large tracts of land for pasturage, in which he says:

> The concession of a great extent of land for the rearing and pasture of cattle constitutes no more than the usufruct of it for the time agreed upon, but the grantee has not, nor never had, the most remote right to solicit the proprietorship, for there is no law or regulation upon which to found it, and consequently the land does not go out of the class of public lands, since it is the same as if held on rent. (2 White, 285–287.)

This opinion was announced less than a year prior to the grant in question. If this principle disclosed in the laws of the Indies (*2 White, 56*) is to receive serious consideration, the claim can not be sustained as one having been *lawfully and regularly derived from Spain*, nor

as having any status which appeals in the least to a chancellor by reason of the good faith of the grantee and those claiming under him occupying, improving, cultivating, and expending time, labor, or money in its development.

Grants are to be construed strictly in favor of the King. (*U. S.* v. *Arredondo*, 6 Peters, 738; *U. S.* v. *Hanson*, 16 Peters, 198; *U. S.* v. *Reysleck*, 15 Peters, 223.)

In the court below some force was sought to be given by reason of the instruments being over thirty years old, proving themselves as lawful and binding instruments according to their terms.

The rules applicable to instruments such as these do not aid claimants.

> Instruments thirty years old prove themselves, but such documents must be free from just grounds of suspicion and must come from the proper custody. (1 Greenleaf Evidence, sec. 570.)
>
> If on the production of the instrument it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. Every alteration on the face of a written instrument detracts from its credit and renders it suspicious, and this suspicion the party claiming under it is ordinarily held bound to remove. (1 Greenleaf Evidence, sec. 564.)

Applying the maxim "*Omnia presumuntur contra spoliatorem*," and the rules just quoted from Mr. Greenleaf render the instruments offered as evidence of title incompetent and insufficient for that purpose, from which it follows the grant is not entitled to confirmation for want of sufficient proof.

The court below confirmed the claim, as an imperfect (equitable) title, and limited the extent to eleven square leagues, as provided by law. (Act 1891, sec. 13, subdivision 7.)

A finding of facts was made and embodied in the decree (R., 103) to the effect that certain proceedings were taken upon the petition of Baca resulting in Alcalde Mora placing him in possession. Also finds "*that said tract of land called the Torreon, had been in the actual possession of Bartolomé Baca for more than four years from the date of the grant on said September 12, 1819.*" Also that petitioner had succeeded to the rights and interests of the heirs of Baca.

It declares upon these findings that as a matter of law the grant to Baca was imperfect at the time of the cession and that petitioner for herself and others were entitled to a confirmation of eleven square leagues of land within the outboundaries of the tract of land called the Torreon, granted to said Baca, and of which he was put in actual possession. (R., 103.)

It is contended on behalf of the Government that no grant of any character was ever made to Baca, and the evidence does not establish that fact.

The right to make the grant and issue evidence of title (testimonio) was expressly reserved and not intended to take place, nor was the possession to be valid or binding so as to constitute any vested right until the action of the alcalde, Mora, was approved by Melgares. (R., 9.) If I am correct in this construction of the recitals contained in the expediente, no title of any grade was passed to Baca by the act of possession or otherwise.

The court did *not find* the proceedings taken by the alcalde, under the order of Acting Governor Melgares (R., 9), had ever been returned "*to this superior office, so that if it had been approved the proper testimonio may be ordered to be given to the petitioner.*"

It did *not* find that the action of the alcalde had ever received the approval of anyone.

It did *not* find that the *testimonio* had ever been executed and delivered to Baca as evidence of his title.

It did *not* define the boundaries of the "*tract of land called the Torreon.*"

The act creating the Court of Private Land Claims provides, section 7 (Reynolds, p. 10), as follows:

> * * * and by a final decree to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, according to the law of nations, the stipulations of the treaty concluded between the United States and the Republic of Mexico at the City of Guadalupe Hidalgo, on the 2d day of February, in the year of our Lord eighteen hundred and forty-eight, * * * and the laws and ordinances of the Government from which it is alleged to have been derived, and all other questions properly arising between claimants *or other parties in the case* and the United States, *which decree shall in all cases* refer to the *treaty, law, or ordinance* under which such claim is confirmed or rejected; and in confirming any such claim, in whole or in part, the *court shall* in its decree specify plainly the location, boundaries, and area of the land the claim to which is so confirmed.

It seems to me these provisions of the law are mandatory and, indeed, wholesome, yet they have been overlooked in this and many other cases.

The best that can be said for this claim is that the possession given *was preliminary to a grant*, if upon final report by the alcalde the governor saw proper to approve. Until this was obtained it amounted to nothing more than a permit to occupy; such occupancy created no equity against the Crown.

Spain and Mexico were under no obligations to grant this land to Baca, and never did do so, and it must fall within the principle announced in the cases of *United States* v. *Clark* (8 Peters, 436), and *United States* v. *Peralta* (19 How., 343), and *United States* v. *Serrano* (5 Wall., 451). The preponderance of the evidence in the case shows that Baca and his heirs never attempted to hold possession adversely to the Crown or Government of Mexico, and therefore I submit the claim can not be sustained as an equitable one entitled to a confirmation to the extent of eleven leagues.

If the claim was imperfect, then it was forfeited prior to the cession of the territory to the United States."

By the terms of the petition Baca obligated himself, if possible, to "*open lands for cultivation, whether irrigable or dependent upon the seasons, for the advancement of agriculture, and, although the water sources it contains are small and uncertain, he proposes to improve them with reservoirs and other appliances which will secure every advantage possible.*" (R., 8 and 9.) Such was the consideration for the grant as solicited by Baca. Under the

eighth subdivision of section 13 of the act creating the Court of Private Land Claims this grant is not entitled to confirmation for failure to establish, at least to a reasonable extent, the compliance with the foregoing promises.

But I contend the grant or concession was forfeited by abandonment and the resumption of sovereignty over the same by the Mexican Government from 1831 to 1845.

Nerio Antonio Montoga grant (1831), R., 91–92.

Tajique grant (1834), R., 96–98.

Chihili grant (1841), R., 99–100.

Antonio Sandoval grant (1845), R., 88–90.

It is earnestly contended that some judicial proceedings should have taken place under the former Government for the purpose of having a forfeiture specifically declared.

I have never been able to find under the Spanish or Mexican law any mode of procedure or uniform practice in this respect. The moment the grantee left the land vacant and unappropriated for the purposes for which it was granted, *ipso facto* forfeiture occurred, and the land fell back into the great body of public domain, to be again disposed of by the Government under the laws regulating the disposition of public lands generally.

This court, under circumstances somewhat similar, in the case of *McMicken* v. *United States* (97 U. S., 204–218), and cases there cited, has settled this question against the claimants.

> "Here no title was granted; nothing but a permit to inhabit and cultivate as preliminary to a grant. It might have ripened into an equitable title had the conditions been fulfilled, or even if a fair effort

had been made to fulfill them, or if any plausible excuse could be offered for their nonfulfillment. But no attempt even appears to have been made to fulfill them, and the Government proceeded to make other dispositions of the land. There is no need of any more formal assertion by the Government of its right to resume the proprietorship. This court has in several cases maintained the doctrine that an actual entry or office found is not necessary to enable the Government to take advantage of a condition broken, and to resume the possession of lands which have become forfeited. It was so held in *United States* v. *Repentigny*, 5 Wall., 211; *Schulenberg* v. *Harriman*, 21 Wall., 44; and *Farnsworth* v. *R. R. Co.*, 92 U. S., 49. In *United States* v. *Repentigny*, the court says: The mode of asserting or assuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly, under the authority of the Government, without these preliminary proceedings. In the present instance we have seen the laws have been extended over this tract, the lands surveyed and put on sale, and confirmed to the occupants or purchasers, and, in the meantime, an opportunity given to all settlers and claimants to come in before a board of commissioners and exhibit their claims. This is a legislative equivalent for the reunion by office found. The same doctrine was applied in the case of Farnsworth in relation to a grant of lands and privileges for the construction of a railroad.

After giving this claim a careful and charitable investigation, I am still impressed with the firm belief, from all the testimony, that the conclusion originally formed by me is correct. When the alcalde, Mora, returned the

expediente, Acting Governor Melgares indorsed his disapproval thereon, and the papers, being of no further value, were never deposited in the archives, and in some way came into the possession of Baca. The grant is too old (1819), too large and valuable, has been the subject of too much official investigation and occupation by hundreds not claiming under it, without knowledge of Baca's claim, to arrive at any other reasonable conclusion, and I think the Court of Private Land Claims should have rejected the same for want of sufficient proof.

Respectfully submitted.

HOLMES CONRAD,
Solicitor-General.

MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.

No. 279 and 299.

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Filed Apr. 23, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

ELOISA BERGERE, FOR HERSELF AND the other heirs of Manuel Antonio Otero, and Miguel Antonio Otero, appellants,
v.
THE UNITED STATES ET AL. } No. 279.

THE UNITED STATES, APPELLANT,
v.
ELOISA BERGERE, FOR HERSELF AND the other heirs of Manuel Antonio Otero, and Miguel Antonio Otero. } No. 299.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

In the Supreme Court of the United States.

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SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

By reason of the additional brief filed by Mr. Vroom in this case, I have deemed it advisable to obtain permission of the court to file a supplemental brief, attempting to cover all of the points raised in both of the briefs on behalf of the claimants in this case.

First.

Primarily, I contend most earnestly that the claimants of the Bartolomé Baca grant are absolutely without title, either legal or equitable, and that therefore the decree of confirmation should be reversed and their petition dismissed. Out of abundant caution the Government has, to this end, prosecuted its cross appeal, although I believe that the statute, properly construed, renders that formality unnecessary.

But, before discussing the proposition that the decree should be reversed *in toto* and the petition dismissed, I shall give my reasons for holding that, if by the most remote possibility the claimants are entitled to any relief whatever, the decree below gave them all that, in any view, they could even plausibly claim.

I.

Melgares, on presentation of the petition, merely gave a permissive right of temporary possession, or at most a provisional or incipient concession, of the lands described in the petition under the "limits" of boundary therein specified, of which the easterly one was the Estancia Spring. For some reason he refused to make or attempt to make an absolute grant in the first instance; nor had he any power to make such a grant. On the contrary, he was cautiously explicit in declaring that although the appointed alcalde mayor should induct the petitioner, Bartolomé Baca, into the precise lands for which he asked, and should point out the very boundary calls intended by the petition (*señalando límites*) and ascertain that the

lands were free from prior rights, yet he should thereupon make to the governor ("this superior officer") a preliminary report, "so that, *if it be approved*, the corresponding *testimonio* may be *ordered* to be given to the petitioner."

Now, even if it be assumed that the governor had at that time full authority to make a complete grant, it is plain that, by the very terms of this incipient concession, he reserved the exercise of that authority until after the making and due consideration of the alcalde's report. It is impossible to read these papers—the petition, the incipient concession, and the report—without being convinced that they form the "*expediente*," or roll of original official instruments involved in the proceeding, and that these original papers were appropriate to *official* custody only. It stands to reason that they were all part of the public archives held by Government officials on a public trust, and could never have been lawfully passed to private hands for private use. They are in no sense a *testimonio*. They were never intended by the governor or the petitioner to be turned over from the proper official control to the personal control of the interested private citizen. Indeed, the express terms of the incipient concession itself import that it went directly into the official custody of the alcalde mayor as his authority to perform the duties thereby enjoined, and that it was a part of those duties for the alcalde himself to "transmit" both the incipient concession and his report thereunder to the governor. The alcalde made this report, and, pursuant to his official duty, he returned the *expediente*, composed

of the petition, the incipient concession, and the report, to the governor. Thus, having the *expediente* before him—important papers pertaining to his office and which ought to be duly kept as royal archives—the next duty of the governor was to consider them with a view to determining whether or not to make to the petitioner a concession or grant in fee, if he had the power, or otherwise to refer the matter to the comandante-general. On no theory can it be reasonably contended that it was in the contemplation of either the governor or the petitioner to surrender these original papers, whether the report was approved or disapproved, to the private custody of Bartolomé Baca.

Upon consideration of the proceedings, at this stage of their progress, the governor would naturally either approve or disapprove the report *in toto*, or else make some other order on the subject. We are kept in total ignorance as to what written comment the governor made. He certainly wrote several words at the foot of the report and subscribed what he wrote, but of these words all that remain on the paper are "*–d los limites por*"—"–d the limits by" (or "for").

An examination of the *expediente* will show that the first remaining word of Melgares's indorsement was not the preposition "*de*," but some word ending in the letter "*d*."

But these words were written on a public archive, not on a paper intended for private use or custody. Shall we assume that if the absent words were now present they would show an *approval* of the report? Shall we

assume that the governor, notwithstanding his Spanish pride of office, found no fault with the unwarranted assumption of authority by which the alcalde undertook, in excess of his delegated power, to put the petitioner in possession of *several hundred thousand acres* in excess of what he had solicited by his petition—the vast tract lying between the Estancia Spring and the Pedernal Hills—and complacently approved this official outrage on the part of a subordinate? Or shall we presume that the governor disapproved the proceedings of the alcalde for their manifest irregularity and even lack of jurisdiction?

When an analogous doubt arises respecting a royal grant, or even a Congressional grant, it is resolved in favor of the Government. (*Slidell* v. *Grandjean*, 111 U. S., 412–437; *United States* v. *Oregon, etc., Ry.*, 164 U. S., 526.)

So far from contemplating the surrender of the original *expediente* to private hands, the governor stated explicitly that in case of *approval* of the alcalde's report the next proceeding would be his *order* for the issue to the petitioner of the "corresponding *testimonio*." Here we have neither order nor *testimonio*. Since Bartolomé Baca was a man of extraordinary prominence and ability—deeply versed in the political affairs of the province—who soon succeeded to the executive functions of Melgares, so far as they continued after Mexican independence, it is impossible that, if Melgares had approved the alcalde's report and *ordered* "the corresponding *testimonio*" to be given, he, the interested applicant, warmed up by the

natural feeling of a favored grantee of a very large estate, should not have immediately demanded his *testimonio*, and should not thereafter have preserved it with due care as an important muniment of his title, and should not, under its sanction, have kept the property free from adverse or inconsistent entry, and should not, finally, have included the granted estate in his testamentary inventory.

II.

If Bartolomé Baca ever came lawfully into possession of the *expediente*—the original papers—after Melgares, upon their transmission to him by the alcalde, had made his note (now mutilated) at the foot of the report, it could only be upon some ground consistent with the integrity of Melgares's official conduct. The only supposable ground is that Melgares, in view of the redistribution or other modification in the nineteenth century of of the old provincial granting powers, had become distrustful of his own jurisdiction, and had referred the incipient grantee, together with the incomplete *expediente*, to the comandante-general at Durango for final proceedings in the premises.

Certainly Melgares could never have given or intended to give to Bartolomé Baca, to keep as personal chattels, papers appropriately belonging to the royal archives, and therefore, if he ever made Baca the custodian of the papers, it was under fiduciary conditions. If Baca ever had them, he held them, not by private right or dominion, but as the King's trustee, either *bona fide* or *ex mal. ficio*.

And there are reasons why we may well assume that Melgares doubted his power to make a definitive grant of so large a tract.

I shall not question here the right of the ancient governors of New Mexico to make grants. They assumed such a power and the assumption was not much questioned until the early part of the present century. As late as August 4, 1805, Governor Real Alencaster took jurisdiction of the petition of Juan A. Garcia for the Bracito tract (claim No. 6), but postponed action until the better settlement of the country in the vicinity of that tract. Afterwards—in 1820—the same petitioner renewed his application before Governor Melgares, whereupon the latter, on the 28th of August, 1820, signed the following decree, viz:

> His Excellency Don Joaquin del Real Alencaster, governor of this province, in a decree of the 4th of August, 1805, conditionally refused to grant the request of the petitioner, and now this Government not having (as it believes) as much authority as that chief, although it is convinced by its topographical knowledge that the resettlement be made, has resolved that the party interested apply to the *proper source*.—Melgares. (Bracito Grant; Ex. Doc., H. R., Twenty-sixth Cong., first sess., Report No. 321, p. 53.)

Thereupon the petitioner applied to "the proper source"—the comandante-general at Durango.

It will be borne in mind that several times in the early part of the century the comandante-general had exercised his supervisory or final power in matters pertaining to grants in New Mexico.

Vide correspondence between the comandante-general and the governor relating to San Marcos Springs, exhibited as Appendix No. 4 of Mr. Vroom's brief. Also the order of Nava relating to the reestablishment of Socorro, Cevilleta, and other towns. (Archive No. 1171.) Also the proclamation of Nemesio Salcedo of October 22, 1807, for promulgation in certain provinces, including New Mexico, of the royal order of February 14, 1805, restricting the area of grants and limiting the powers of local officers to dispose of land except upon pecuniary considerations. (Reynolds, 77.) Also the Los Trigos or Donacion Vigil grant of 1814 and 1815. (Ex. Doc., H. R., Thirty-sixth Congress, first session, Report 321, p. 105; translation of it, p. 109.)

From the order of Governor Manrique, dated May 26, 1814, it appears that in the preceding year he had "transmitted to the superiority of the general commandant" the original petition for the grant, and resumed jurisdiction in 1814 only because of the recent promulgation by the viceroy of the decree of the Cortes of January 4, 1813.

There had been some interruption of the exercise of the old powers by the jurisdiction given to the provincial deputations and the ayuntamientos by the law of the Cortes of January 4, 1813, under the constitution of 1812; and, when that constitution was revoked in 1814 and the old régime restored (Hall, section 109), it may well be that more or less confusion attended the rehabilitation of old officials.

Upon the revocation of the constitution of 1812, the King restored the local powers of the old officials who

had remained loyal to the Crown, but left them under the same limitations which had been imposed up to the date of that constitution.

III.

But for the demonstration of the present proposition it is not material to determine what were the ultimate limits of Melgares's powers in 1819 concerning the concession of land titles, because it is evident that he did not, in Bartolomé Baca's case, go beyond the incipient steps. Therefore, the title, if there was any at all, was simply "incipient," "inchoate," "equitable."

If Melgares looked to the comandante-general as the final authority to make the grant requested, and so referred Baca to that official, instead of assuming to make a definitive grant himself, the case is analogous to those of incipient concessions made by the lieutenant-governors and other subordinates in Louisiana and Florida, which, when not completed by the superior authority, e. g., that of the *Intendente* or *Governor-General*, were always treated as merely "equitable." (*Delassus* v. *United States*, 9 Peters, 116; *United States* v. *Kingsley*, 12 Peters, 476 (483–5); *United States* v. *Wiggins*, 14 Peters, 334 (348); *Menards Heirs* v. *Massey*, 8 How., 305; *United States* v. *Boisdore*, 11 How., 87; *Glenn* v. *United States*, 13 How., 250.)

On the same principle the concession, if it was not revoked, remained merely incipient and equitable, even if Melgares had the power to complete it, because he never undertook to do so.

IV.

While instances may possibly be found of grants attempted to be made definitively in the first instance, with instructions to the juridical officer to give a *testimonio* to the grantee "to serve as title," most of the concessions under both Spain and Mexico were inchoate and incipient only, and for their completion as "grants," or consummate titles, further action of the granting authority was necessary. In cases, if any there are, of the former class, the definitive title would remain of record in the granting office, and the *testimonio* delivered to the grantee would remain his private muniment of title. In the other cases—that is, in ordinary cases—the original papers—the petition and concession—were not immediately filed or recorded in the granting office, but were intrusted to the temporary official custody of the officer who was directed to make the preliminary investigation or "survey" of the land affected and deliver provisional possession.

Sometimes, perhaps because of the remoteness of the proper alcalde from the capital, the incipient original papers were put into the hands of the grantee, in order that he might deliver them to the alcalde. It was the duty of the latter, after making the investigation or "survey" and delivering provisional possession, to make a statement in writing of his proceedings, this statement being the "act of juridical possession," and being in official custody of all the instruments of inchoate title—called the *expediente*—to transmit that *expediente* to the granting office for further proceedings. Appropriately, the alcalde ought to transmit the *expediente* personally or

directly, but frequently, for the sake of convenience, the alcalde intrusted the *expediente* to the grantee, who became thus burdened with the duty of returning the originals—the *expediente*—to the governor. It is quite plain that in such cases it was never intended that the original papers should pass from the alcalde to the grantee except on a trust for their due transmission, nor that while they were thus in the grantee's fiduciary custody he could with impunity violate his trust by secreting them or otherwise withholding them from the royal archives out of which they had been permitted to go for a purpose merely temporary, thus leaving the Government without any record whatever of the inchoate transaction.

Since, as I have shown, Bartolomé Baca could not, as a private citizen, have lawful custody of the original papers (or *expediente*) of the concession, unless for the purpose of transmitting them to the comandante general at Durango, he was, while he held them, if we assume his good faith, in precisely the same predicament as the private holders of incipient concessions in Louisiana or Florida, on whom devolved the duty of taking the muniments of their inchoate titles to the final granting authority, whether king, governor, intendente, comandante, or audiencia, for their perfection and completion.

The regulations of Morales, cited in *Menard's Heirs* v. *Massey* (8 How., 293, at pages 306 and 307), merely declare the rules and principles which obtained in all jurisdictions wherein incipient Spanish grants were made:

> The necessity of a further title than a mere loose order of survey, given by commandants of posts

and lieutenant-governors, and placed in the hands of the interested party, is too manifest for comment.

Petitions were written by the party asking the land, or someone for him; the governor consented, usually by indorsement on the petition, and ordered that the petitioner should have the land, and directed that it should be surveyed; the paper was handed to the petitioner, who might deliver it to the surveyor, or omit it; if he presented it and the land was laid off, then it was the surveyor's duty to record both the concession and the plat, together with a *proces verbal*. But this did not make the party owner; without the further act of the King's deputy—the intendant general—the title still continued in the Crown.

Unfortunately for the claimants, the alleged precedent of the delivery of the original *expediente* of a concession to the grantee in the Galvan ranch, or Ignacio Sanchez Vegara grant, has no basis in fact, since that pretended title is a forgery. (Mr. Vroom's brief, p. 78.)

V.

It thus clearly appears that Bartolomé Baca could at no time even pretend to have received from Melgares anything superior in degree to an incipient, inchoate, equitable, and consequently imperfect and incomplete title.

Second.

Notwithstanding that the first order, or "order of survey," signed by Melgares may have imported an incipient concession, and contemplated a right of temporary possession of the lands specified in the petition under the exact

boundaries therein described—but of no larger area—no equity in favor of Baca arose against either Mexico or the United States.

I.

The temporary possession given by the alcalde was nonconformable to the concession, and was excessive and even fraudulent. (*Pinkerton* v. *Ledoux*, 129 U. S., 346 (354).)

II.

To create an equity sufficient to bind Mexico, or afterwards the United States, to complete the incipient concession, it was necessary for Bartolomé Baca to act in good faith both in regard to the original papers—if they were ever in his hands—and in regard to the subject-matter involved. If the original *expediente* got into his hands by any means, he should, with reasonable diligence, have either transmitted the same to the *comandante general* or returned it to the governor, instead of fraudulently converting it to his own use. And, as to the land itself, if he was in any sense the honest occupant of it as equitable owner, he was bound to fulfill, with diligence, all the conditions specified in the concession, such as inhabitancy, the construction of reservoirs, etc.

In *United States* v. *Kingsley* (12 Pet., 476), it was said at page 485:

> These Florida grants or concessions of land upon condition have been repeatedly confirmed by this court, and it will apply the principles of its adjudications to all cases of a like kind. It will, as it has

> done, liberally construe a performance of conditions precedent or subsequent in such grants. It has not, nor will it apply, in the construction of such conditions, in such cases, the rules of the common law. But this court can not say a condition wholly unperformed, without strong proof of sufficient cause to prevent it, does not defeat all right of property in land, under such a decree as the appellee in this case makes the foundation of his claim.

[The opinion then proceeds to distinguish ordinary cases from that of Arredondo by saying: "Arredondo's grant, confirmed by this court (6 Pet., 691), was a clear case of a grant in fee for past services and commendable loyalty to his sovereign, with a condition subsequent, of a nature the performance of which must have been a matter of indifference as well to the King of Spain as to the United States, after a cession of Florida was made."]

III.

I have never, in thought or argument, undervalued a serious, open, exclusive, actual possession, anciently begun and consistently continued under fair color of title, but the present case presents nothing analogous to such a possession. What stands out conspicuous is the lack of exclusive possession and confident dominion on Baca's part, and the presence of repeated inconsistent entries under Mexican officials upon the notorious and uncontested claim that the land was vacant and unappropriated public domain—entries and sovereign claim beginning during Baca's lifetime, while he was prominent in official station, and continued at intervals until the American occupation.

It is absurd to contend that any formal procedure of forfeiture was ever necessary to entitle a sovereign to take official notice that incipient proceedings toward a grant of public land had been suspended or abandoned, and accordingly, ignoring such futile proceedings, to regrant the same property. (*United States* v. *Repentigney*, 5 Wall., 211 (267); *McMicken* v. *United States*, 97 U. S., 204 (218).)

Inchoate titles, so weak and imperfect in character, could not be made definitive and perfect except by express sanction of the sovereign authority concerned, or else by a like sanction implied from an undisturbed ancient possession and claim.

The sovereign refusal to complete and perfect an inchoate claim might be evinced in any one of many ways. It might appear from a disapproval written on the original, incipient concession, as may well be assumed to have happened in the present case, or it might appear from any subsequent sovereign act inconsistent with the pretended inchoate claim.

The evidence, as well as the archives, discloses the election of the Mexican officials, the political chiefs and governors, territorial deputations, ayuntamientos, alcaldes, and others, to treat the land described in Baca's petition as part of the vacant, unappropriated domain of Mexico. If Baca ever entered on the land as an equitable claimant, he was ousted by the reentry of the Government. In truth, he abandoned all pretense of title or of right of possession. His heirs continued acquiescent in this abandonment of possession or claim. All this sufficiently appears from the terms of the subsequent grants of Nerio

Antonio Montoya (1831), Rec., p. 91–92; the Tajique (1834), Rec., p. 96–98; the Chilili (1841), Rec., p. 99–100; and Antonio Sandoval (1845), Rec., p. 88–90, already sufficiently discussed.

One sovereign reentry on the tract, in conflict with the theory that it was private property, was a denial and disavowal of the entire pretense of a title in Baca now resurrected by its comparatively recent purchasers.

IV.

It is idle to contend that the mutilated *expediente* was ever issued to Bartolomé Baca as a *testimonio*. A *testimonio* proper would be countersigned by the Secretary of State. The papers presented are undoubtedly the very originals themselves. They bear on their face internal evidence that they pertained to the royal archives and that in case a grant should be definitively made after approval of the alcalde's report it should be evidenced to Baca by "the corresponding *testimonio*" to be issued to him. The *testimonio* contemplated was a secondary instrument, to be duly formulated as a new thing "*corresponding*" to the original *expediente*. If "the corresponding *testimonio*" had ever been issued it would have been preserved by Baca and his heirs with ordinary care and produced in evidence. But no such *testimonio* was produced, and none could be, since none ever existed. Had one ever been issued, the land affected would have been Baca's most valuable asset, duly protected by him and duly noted in his last will in the same category with his other assets.

The mutilation of the *expediente* was made either by the King's authority before it came into the possession of Baca or his heirs or it was fraudulently made afterwards by him or them. On the first hypothesis the mutilation imports the sovereign disavowal and cancellation of the concession. On the second hypothesis the mutilation imports a spoliation by the parties in interest. In either case, nothing can be claimed under the *expediente*.

Finally, the claimants show the *expediente* in improper and suspicious custody, and they render no account whatever to explain away the resulting imputation of fraud. On their own showing, they are not entitled to these archive papers.

In an action of replevin, or under a search warrant, or in a proper chancery proceeding, the claimants would be compelled to surrender these public papers to public custody. If, as claimed, the archives of the Government were despoiled and fraudulently sold or given to private persons in 1837 or 1870, the presumption is that the *expediente* now produced was thus diverted from the sovereign custody. Appearances indicate that the concession was canceled by mutilation of the last signature of Melgares and the clause next preceding. The claimants are estopped from saying that they or their privies fraudulently or negligently made the mutilation themselves.

Third.

The foregoing argument has been made with a view of showing the claimants to be absolutely without title, perfect or imperfect (legal or equitable).

Admitting that the indorsement by Melgares was an approval, still that approval should have been followed by the delivery of a formal *testimonio;* the definitive title did not pass at this stage of the proceedings. It remained for some higher authority to examine into the matter and by concurrence pass the definitive title and authorize the proper *testimonio* to be given as evidence thereof, and also require a proper record to be made.

An examination of the laws of the Indies and the ordinances promulgated by royal authority from time to time will, I think, lead to the conclusion suggested. (Hall's Mexican Law, 1–9; Historical Sketch, Reynolds, 25; 2 White, 24 to 57; Royal Cedula, October 15, 1754; Reynolds, 50, see sec. 9, p. 54; Royal Cedula, March 23, 1798, and proceeding thereunder, Reynolds, 65 to 78.)

The laws of the Indies, so far as they relate to the disposition of lands to individuals, were a revision of all former laws upon that subject. This cedula required all grants to be confirmed before the right of the King to intervene at any time to annul or modify was foreclosed. (See sec. 9, Reynolds, 54.)

Counsel for claimants reach the conclusion "that the law of 1754 was the source of authority for the governor of New Mexico to make a land grant in 1819." (Appellant's brief, p. 9.)

If this be correct, which I very much doubt, the confirmation by superior authority was necessary before a definitive title could pass. The provisions of this law were as mandatory as similar provisions contained in the laws of the Indies relating to pueblo grants. Mr. Justice White, for the court, in the case of *The United*

States v. *Santa Fe*, 165 U. S., 675, 688, upon this requirement, said:

> It may well also be implied from the provisions in the Recopilacion that the right of a town to hold land for public purposes was required to be evidenced by a grant from the viceroy or governor, and that such grant, when made, required confirmation by the crown. Thus, law 1, title 13, book 4, of the Recopilacion (2 White, New Recop., p. 55), is as follows:
>
> "The viceroys and governors, being thereto authorized, shall lay out for each town or village which shall be newly founded and peopled the lands and lots which they may want, and the same shall be granted to them as reservations [propios] without prejudice to third persons. They shall transmit to us information of what they shall have laid out, that we may order the same to be confirmed."
>
> Whilst it may be that the necessity for confirmation was dispensed with at some date, much later than the establishment of Santa Fé, there is no question that this provision was in force at the time when it is claimed that the settlement came into existence as a Spanish town.
>
> The theory, then, of the vesting by operation of law in every Spanish town at the time of its organization of a title to 4 square leagues of land finds no support in the text of the Spanish laws, and is repugnant to their general tenor, as it is in direct conflict with mandatory provisions of that law, exacting a grant and its confirmation.

If it has been shown to the satisfaction of the court that Acting Governor Melgares made the grant (concession) and approved the boundaries as defined by the

alcalde, and the grantee was placed in possession, under the law of 1754 it was but a concession, and required confirmation by superior authority before the definitive title could pass to the grantee.

It may be true the title at this stage of the proceeding was valid, but graded as imperfect or inchoate, and subject to the restriction of the seventh subdivision of section 13 of the act creating the Court of Private Land Claims.

Section 12 of the cedula of October 15, 1754 (Reynolds, 55), provides:

> In provinces remote from the Audiencias, or where the sea is between, such as Caracas, Havana, Cartagena, Buenos Ayres, Panama, Yucatan, Cumana, Margarita, Puerto Rico, and others in like circumstances, confirmations shall be made by their governors, with the approval of the royal officers and Acting Attorney-General, where there is one, etc.

It has been contended that New Mexico should be classed with the provinces named under the clause "others in like circumstances." It was not named, and can only come within this clause by implication.

I shall not go into this, as Melgares was only acting governor, only a subdelegate, and did not pretend to possess vice-regal authority. He was bound by the laws and regulations in existence at the time, which I shall attempt at this point to examine.

The absence of a *testimonio*, as well as of any order for its issue, the lack of proof of an approval of the alcalde's report, the secret and unlawful retention in private hands of the original *expediente*, the mutilation

of that *expediente* in an essential and vital part, the excessive area claimed by virtue of the unauthorized act of the alcalde, the failure of proof as to long-continued, open, and exclusive possession and claim upon which plausibly to support a title by presumption, and the affirmative, uncontradicted proof of adverse entries on the land, with sanction of all the local authorities of the Government from time to time during a period of nearly thirty years subsequent to 1819, under open, public, formal, and even solemn assertions that the land was "vacant," "unoccupied," in a "condition of mortmain," all ought to be enough to condemn the present claim in every part, without any resort to the further argument that Melgares lacked the power to make so extensive a concession as that now under consideration.

Nevertheless, I shall briefly state some additional reasons for believing that, however broad the ancient granting powers attributable to Spanish provincial governors in the centuries anterior to the current century, a change occurred in the royal policy in the period which began about the time of the French Revolution, and continued until the separation of Mexico from Spain, and that, because of this change of policy, Melgares, who was only an "acting governor," and held no commission directly from the King, and was therefore not a delegate, but only a subdelegate, very much distrusted his granting authority, at least so far as the making of large concessions was concerned, and, although he undertook to make some grants, generally of moderate extent, he frequently manifested great timidity on the subject, and

showed by his written declarations and his conduct that, in relation to important titles at least, he did not presume to act definitively. Indeed, it is plain that he looked to the comandante general as the superior authority in order to confer an unquestionable title to large tracts of Crown land.

The court will notice that in the case of the Bracito grant a petition therefor was presented in 1805 to Don Joaquin del Real Alencaster, who, "in a decree of the 4th of August, 1805, conditionally refused to grant the request of the petitioner," and that afterwards, in the year 1820, the application was renewed before Governor Melgares, and that official, by his decree of August 28, 1820, declaring his belief that he did not have "as much authority as that chief"(Alencaster), ordered "that the party interested apply to the proper source." The "proper source" referred to was the comandante-general, and accordingly the petitioner went before that high representative of the King, who thereupon, as of course, assumed jurisdiction of the case. The result was that the grant was finally made through the intervention of the lieutenant-governor at El Paso. (Ibid, Bracito grant.)

We find that the comandante-general, at the very beginning of this century, commenced most seriously and effectually to assert his authority over lands in the province of New Mexico.

On the 18th of January, 1800, Don Pedro de Nava, comandante-general, gave explicit orders to the governor of New Mexico for the reestablishment in that province of the towns of Socorro, Cevilleta, etc. (*Vide*

Exhibit, Archive No. 1171; Mr. Vroom's Brief, Appendix No. 4.)

The royal cedula of March 23, 1798 (Reynolds, p. 65), indicates that much prejudice to small owners had resulted from the provisions of article 81 of the Ordinance of Intendants requiring their incipient titles to be transmitted to the superior board for confirmation, because the difficulties and delays of such transmittals were too expensive and onerous, and that accordingly grantees were excused from seeking such confirmations, provided they made to designated authorities certain pecuniary payments. The language of this royal cedula seems to imply (Ibid., p. 67) that it was only in the case of lands of small value that the granting proceedings could be completed before local officers. Whether or not this cedula extended to New Mexico, it is important as showing the adoption of a restrictive policy in the making of grants.

The cedula of March 23, 1798 (Reynolds, p. 65), was followed by the very important cedula of February 14, 1805 (ibid., p. 68), which, as I shall show, was duly promulgated in New Mexico in 1808. In this cedula the King recites the enormous abuses of the granting powers by some of his delegates in New Spain, and proceeds to impose restrictions on the local granting authority. Although the chief mischief against which the King sought to guard by the cedula of 1805 was the wasteful disposition of the valuable lands in the fertile districts of Mexico, leading to a dangerous land monopoly, it is plain from its terms that its scope and policy extended to all the provinces, rich and poor. Two points stand out, namely, first, that the King insisted on the demand and

receipt of a stated price before a complete title could be issued, and, second, that the King restricted the size of such grants to an area embracing comparatively few square leagues—less than one-twentieth part of what the claimants in this case seek as representatives of Bartolomé Baca.

This cedula concludes (ibid., 73) as follows:

> And to facilitate to the vassals the benefit and cultivation of the same in conformity with my sovereign intentions, authorizing, as I do authorize, the governors of the internal provinces to admit denouncements indiscriminately, and to make sales of Crown lands in their respective districts, provided that they do not exceed the quota prescribed by the said superior board, and under the condition to make report to the same for its approval; and therefore, I order and direct that you communicate this provision to all whom it may concern, or publish it by proclamation in that Kingdom in order that it may reach all, with care that it be observed and obeyed in all its parts, such being my will, and of this my royal order note shall be taken in the general auditor's office of my said council.

It expressly approves a decree dated May 10, 1802, of the superior board of the royal treasury, composed of the viceroy and other high officials, but it seems (Reynolds, p. 76) that that board, in view of the "inconveniences caused by the limitation established as to the number of *sitios* which might be adjudicated to one person," formulated May 13, 1804, a supplementary decree on the subject and caused the same to be transmitted September 16, 1804, for the royal approval. It will be noticed that the royal order of February 14, 1805, takes

no notice of this proposed supplementary decree (the purport of which is not known), and the viceroy delayed promulgation of that royal order for upward of two years, apparently in the expectation of receiving notice of the King's decision regarding the amendment thus suggested. Evidently the King did not approve the proposed change. Consequently the very restrictive order of February 14, 1805, was on July 27, 1807, ordered by the viceroy to be promulgated (Reynolds, p. 77):

> And that this may reach the notice of all it shall be published by proclamation in this capital (Mexico), of which paper copies will be forwarded to the comandant-general of the internal provinces and the intendants and magistrates of the jurisdiction of this Government.

On October 22, 1807, Nemesio Salcedo, the comandante-general, made his order of promulgation (Reynolds, p. 77):

> Let this proclamation be promulgated in the district of the provinces under my command, independent of the vice-royalty of Mexico, that it may be complied with, etc.

Conformably (Reynolds, p. 78) the royal order was, on March 9, 1808, duly promulgated in the jurisdiction of San Geronimo de Taos (New Mexico), and on March 21, 1808, in the jurisdiction of Santa Cruz de la Cañada (New Mexico).

In the pretended *expediente* of the Santissima Trinidad, or Galvan grant, the petitioner, in the year 1809, says, "conforming myself to the Royal Cedula of 14th of February, 1805, ordered published by proclamation."

Can there be any doubt that, when a few years after 1819 the Government of Mexico displaced that of Spain, in New Mexico and the other Mexican provinces, the large tract now in controversy was under public dominion? Is not this conceded by the conduct and acquiescence of Bartolomé Baca and his heirs? Is not this proved by the assertion of public title by the Mexican authorities? It is idle for the claimants to invoke the rules of prescription and presumption. Those rules are intended to quiet long-continued claims accompanied with possession—not to aid stale demands against present adverse possessions. Every grant made by the Mexican authorities of parcels of the tract, under the public claim that the same was vacant public domain, was an interruption and denial of all inconsistent pretensions. This is true whether these grants were made in strict conformity with law or otherwise. The interruptions which break the continuity of an adverse possession may be altogether wrongful, but they are nevertheless operative as interruptions. Therefore, it is not incumbent on the Government to assert the validity of any of these subsequent grants. Those interested in maintaining them might, however, cite the confirmation by Congress of similar grants, such as the Maxwell (121 U. S., 325) and Sangre de Cristo (*Tameling* v. *U. S. Freehold, etc., Co.*, 93 U. S., 644), with as much propriety as the present claimants cite such confirmation of a few of the grants made by Melgares.

In conclusion, I insist that the decree should be absolutely reversed and the petition dismissed. The claim is even less meritorious than that of Repetigny (5 Wall., 211).

It is evident that the actual improvements mentioned by some of the witnesses took place at the little settlements which, without opposition by Baca or his heirs, were the subject of the subsequent grants made by the Mexican authorities—on the open, public claim that the land was unappropriated public domain. At the date of the pretended concession the royal order of February 14, 1805, then extant, required pecuniary payment to be made for the acquisition of large tracts, and no suggestion of any pecuniary consideration is made in the petition or provisional concession. The production from an old trunk in private hands of a mutilated original *expediente*, seventy-five years after its date, so far from showing title to the land now claimed, merely proves a violated trust or an unlawful diversion from the public archives of public papers. The suspicion which attaches to both the mutilation and the custody is in no way relieved by explanatory proof, direct or circumstantial. Since it would be contrary to law to deliver the *expediente* to a private citizen, except in trust to transmit it to the comandante-general, and since on this hypothesis that *expediente* was wrongfully diverted from that trust and converted by those under whom the claimants seek a confirmation of title, they are now in the attitude of suitors in chancery coming into court with unclean hands. Every presumption of law and equity is against them, and they should not be heard when they ask a vast estate upon grounds so weak and so unworthy of confidence.

Mr. Vroom cites in his brief, page 78, an indorsement of approval and order for the delivery of the original

expediente to the grantee as evidence of title of what is known as the Santissima Trinidad, or Rancho de Galvan tract. The validity of this grant is involved in case No. 43, *Leandro Sandoval et al.* v. *United States*, the transcript of which has not been printed, and which was passed under the twenty-sixth rule.

In the court below one of the defenses made by the Government was that the indorsement of approval relied upon by counsel in this case was a forgery, and the court so held. The signature of Governor Manrique to that indorsement was clearly shown to be a forgery, as will appear by the testimony of Mr. Key and Mr. Palen in that case and by the indorsement. This indorsement will be found at page 18 of the transcript now on file in the clerk's office. Mr. Catron, counsel for appellant, assisted me in the trial of that case.

Replying further to brief of counsel recently filed, I shall not discuss as the first point raising the question as to whether or not the seventh subdivision of section 13 is in violation of the Constitution and in violation of the treaty; for the right of the political branch of the Government to violate a treaty or to abrogate it has always been recognized by the judicial branch of this Government. In delegating to the judicial branch of the Government *quasi* political functions, Congress has the right to limit and restrict the powers of the judiciary in enforcing rights claimed under a treaty.

As to the second proposition, counsel contends that treaties as part of the fundamental law, are superior to adverse legislation in so far at least as rights vested under

them are concerned, and they are therefore superior to adverse legislation.

Counsel errs in supposing that the treaty conveyed any rights to private individuals. It was only agreed thereby to recognize and protect such as existed, and this obligation was purely executory in its character. The manner in which and the time when these rights were to be recognized was left exclusively to the political branch of the Government.

It has been held by this court since the organization of the Government to the present time that a treaty as the law of the land may be abrogated or modified by legislation of Congress either directly, or by implication from a conflict between the provisions of subsequent legislation and those of the treaty. (The Cherokee Tobacco Case, 11 Wall., 616; Head Money Cases, 112 U. S., 580.)

I do not feel this case should be submitted without some reference to the supposed leading cases cited and quoted from extensively by counsel for claimants, and content myself with the observations of Judge Sluss in a dissenting opinion in the case of *Montoya* v. *United States* (No. 272, C. P. L. C.).

This grant was made in 1766–67 by Governor Cochupin. Suit was instituted by Garcia to confirm the same, claiming under Montoya by mesne conveyances. Upon the trial, one of the deeds was discovered to be a forgery, and the suit was dismissed.

More than two years after the taking effect of the act creating the Court of Private Land Claims, the heirs of

the original grantees filed their petition for confirmation. The Government interposed the defense that under the twelfth section of said act the claim was barred. This raised the question as to whether the grant was perfect or imperfect. The court below held that this section applied only to imperfect grants, and it became necessary to determine that question. A majority held the claim to be perfect and confirmed the same. Judge Sluss dissented for the reasons given in his opinion, printed as an appendix to the Government's brief in the case of the *Rio Arriba Land and Cattle Company, Limited*, v. *The United States*, No. 195, now under advisement by this court, to which I respectfully refer.

Respectfully submitted.

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